STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 17, 2004
v	No. 247783 Wayne Circuit Court
ALAN DANIEL POSNER, Defendant-Appellant.	LC No. 02-010730

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

A jury convicted defendant Alan Daniel Posner of operating a motor vehicle while impaired.[1] The trial court sentenced defendant to eighteen months to five years in prison. Defendant appeals his conviction and sentence, and we affirm.

I. Underlying Facts

On August 21, 2002, shortly after midnight, a Wayne County Sheriff's deputy arrested defendant for driving while impaired on Ford Road in Wayne County. Following his arrest, defendant submitted to two Breathalyzer tests, both of which gave a reading of .08.[2] Defendant maintained that the Breathalyzer results were inaccurate because his acid reflux condition caused an elevated, false result. Defendant also asserted that evidence of the Breathalyzer results should have been suppressed and the case dismissed, because defendant was denied his right to an independent blood-alcohol test under MCL 257.625a(6)(d).

Wayne County Sheriff's Deputy Rommel Saleh testified that on the day of the incident, he saw defendant's car being driven erratically. When the car stopped at a red light, Saleh noticed that it had only one functioning brake light. Because of defendant's driving and the malfunctioning brake light, Saleh signaled defendant to stop. After defendant pulled into a

[1] MCL 257.625(3)

[2] The Breathalyzer test measures the level of alcohol in the bloodstream. A reading of .08 indicates that a person has 0.08 grams of alcohol per 210 milliliters of breath. See MCL 257.625(1)(b).

parking lot, Saleh approached defendant's window. As Saleh spoke to defendant, he noticed that defendant's breath smelled of alcohol and that defendant's eyes appeared "glossy" and "bloodshot." When Saleh asked whether defendant had been drinking, defendant claimed that he had one glass of wine. Based on Saleh's experience and observations, he concluded that defendant was driving while under the influence of liquor.

Because of these reasons, and because defendant failed two field sobriety tests, Saleh arrested defendant. Prior to administering the Breathalyzer tests, Saleh testified that he read defendant his chemical test rights, and advised defendant that he had "the right to demand that a person of [his] own choosing administer a breath, blood, or urine test." After defendant voluntarily agreed to take the Breathalyzer test, Saleh observed him for a mandatory fifteen-minute period to ensure that defendant's mouth remained clear, and that he did not belch, vomit, or do anything that could cause a false reading. Also, according to Saleh, defendant never told Saleh that he had any medical conditions, and Saleh denied that defendant ever requested an independent blood-alcohol test.

After Saleh administered the aforementioned tests, he placed defendant under Deputy Linda Rodgers' supervision. Rodgers testified that on August 21, 2002, she was responsible for escorting prisoners to the cellblock. Though she was not initially involved with defendant, she heard Saleh read defendant his chemical test rights and was aware that defendant had a Breathalyzer test.

Rodgers testified that she told defendant how to use the phone located in his cell, gave him written instructions on how to use the phone, and gave him the phone number to the building. Rodgers testified that defendant asked, "[I]s he going to take me to the hospital for a blood test?" She told defendant that she would pass the information on to Saleh, because defendant was not her prisoner. Rodgers later told Saleh that his "prisoner wants to go to the hospital." When she later checked on defendant, he again asked, "[I]s officer [sic] going to take me to take my blood test."

Defendant's mother testified that on August 20, 2002, defendant visited her for dinner at 9:30 p.m. and stayed until midnight. Sometime after 11:30 p.m., defendant asked his mother for a liquid antacid because he was having an "acid reflux situation." She gave him Tums, chopped ice, and menthol. Because she went to bed, she was unaware of what time defendant left her home. Defendant's mother did not see defendant consume any alcohol during his visit; however, she said that she had an open bottle of wine in the refrigerator.

Defendant was arrested approximately one mile from his mother's house. Defendant testified that, while at his mother's house, he drank one glass of wine. Defendant maintained that, although he drank a small amount, the Breathalyzer results were elevated because of his acid reflux condition. The defense presented a gastroenterologist who examined defendant in November 2002, and testified that defendant has astrogastrophy, which is a stomach lining condition caused by alcohol induced liver disease, and esophagitis, which may cause acid reflux. Importantly, on the pivotal point of the effect of defendant's condition on the Breathalyzer test, the doctor was unaware whether defendant's conditions would affect the results of the test. With regard to the failed field sobriety tests, defendant indicated that he advised Saleh that he had equilibrium and balance problems because of a hearing loss. Defendant denied being intoxicated or driving erratically on August 21, 2002.

Defendant denied that Saleh fully advised him of his chemical test rights, but admitted that he agreed to take two Breathalyzer tests. Defendant maintained that, after the second Breathalyzer, he asked Saleh for a "blood test." According to defendant, Saleh responded that he had already performed two tests. Defendant testified that, when Rodgers took him to a cell, he asked, "how do[es] [he] get a blood test." According to defendant, Rodgers responded: "Well, we'll have to get a nurse, see if we have one available," and that "it will be more accurate." Defendant denied that anyone gave him any verbal or written instructions on how to use the phone. He claimed that he did not know how to operate the phone and that, when he tried to call his parents, the phone "didn't function." Defendant admitted that, during a pretrial hearing, he testified that he made a collect call to his parents, and his "father picked up and he's kind of handicapped and it didn't go through and suddenly it never went through after that."

At a post-trial evidentiary hearing, defendant testified that, although he drank alcohol on the day of the incident, he was not intoxicated. Defendant denied that his car swerved, but stated that it "may have touched the line" when he reached under the dash to repair something. With regard to the field sobriety tests, defendant claimed that he informed Saleh that he had balance problems. Additionally, when defendant performed the tests, a light was shining in his eyes, and he was nervous. Defendant also asserted that the Breathalyzer tests were inaccurate because he had only one glass of white wine. He denied that Saleh complied with the fifteen-minute observation period before performing the Breathalyzer tests.

Defendant claimed that he asked for an independent blood test on at least three occasions. According to defendant, after Saleh advised him of his Breathalyzer results, he told him "that's not right." Defendant claimed that he subsequently asked a white female deputy what he had to do to obtain a blood test. She allegedly told him that they would see if a nurse was available. He later asked a black male deputy if he was "going to get a test, a blood test," and that deputy ignored him. Defendant also testified that, while in the cell, he tried to call his mother several times and nobody answered. He testified that, at some point, his father answered, but the call was disconnected. Defendant claimed that, hours after being booked, he asked another deputy about taking a blood test, but he was unsure if that deputy heard him.

II. Motion to Suppress

Defendant claims that the trial court erred when it denied his motion to suppress the Breathalyzer results because, although he made several requests, he was denied his right to an independent blood-alcohol test, in violation of MCL 257.625a(6)(d).

We review a trial court's factual findings with respect to a motion to suppress evidence for clear error. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999); *People v Prelesnik*, 219 Mich App 173, 178; 555 NW2d 505 (1996), overruled in part on other grounds in *People v Wagner*, 460 Mich 118, 123-124; 594 NW2d 487 (1999). "A decision is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *People v Chambers*, 195 Mich App 118, 121; 489 NW2d 168 (1992). We review the trial court's ultimate decision regarding a motion to suppress de novo. *Echavarria, supra.*

MCL 257.625a(6)(d) provides, in pertinent part:

> A chemical test described in this subsection shall be administered at the request of a peace officer having reasonable grounds to believe the person has committed a crime described in section 625c(1). A person who takes a chemical test administered at a peace officer's request as provided in this section shall be given a reasonable opportunity to have a person of his or her own choosing administer 1 of the chemical tests described in this subsection within a reasonable time after his or her detention.

Therefore, the relevant inquiry is whether defendant was given a reasonable opportunity (1) to have an independent blood-alcohol test, (2) performed by a person of his own choosing, (3) within a reasonable time after his detention. *Prelesnik*, *supra* at 180.

Here, though defendant testified at the hearing that he requested a blood test at least three times, Saleh testified that defendant never requested a blood test. The trial court concluded that defendant was not credible. This Court defers to the trial court's assessment of the credibility of witnesses at a suppression hearing. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999); *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992). We are not left with a firm and definite conviction that a mistake has been made by the trial court here. Therefore, we conclude that the trial court did not err when it denied defendant's motion to suppress the evidence of defendant's Breathalyzer results.

III. Motion to Dismiss

Defendant maintains that the trial court erred when it denied his motion to dismiss because he was denied his right to obtain exculpatory evidence from an independent blood-alcohol test.[3] In support of this claim, defendant asserts that Rodgers plainly testified at trial[4] that defendant requested a blood test. Defendant further asserts that simply allowing him access to a restricted phone did not provide him with a reasonable opportunity to obtain an independent test as required by MCL 257.625a(6)(d). We review a trial court's ruling regarding a motion to dismiss for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001). The trial court concluded that the facts did not support a finding that defendant was denied a reasonable opportunity to obtain a blood test; therefore, it denied defendant's motion. The court noted that defendant had access to a phone in his cell.

Initially, defendant heavily relies on Rodgers' testimony. However, Rodgers testified that defendant asked, "is [Saleh] going to take me to the hospital for a blood test?" We conclude that this ambiguous query did not amount to an actual request for assistance to obtain an independent blood-alcohol test. Accordingly, defendant's general statement did not create an

[3] Because the purpose of affording an accused a reasonable opportunity to obtain an independent chemical test by a person of his choosing is to ensure that scientific blood alcohol content evidence is not at the sole disposal of the prosecution, dismissal of an OWI charge may be appropriate where a defendant is deprived of his right to an independent test. See *People v Green*, 260 Mich App 392, 407; 677 NW2d 363 (2004).

[4] However, she did not testify at the evidentiary hearing.

obligation for the police to transport defendant to an unspecified location. If we accept defendant's position, the police would have the burden of arranging an accused's independent testing, as opposed to simply providing him a "reasonable opportunity" to obtain testing, as required by the statute. There is simply no evidence here that defendant attempted to make any arrangement with anyone to administer a blood-alcohol test, or selected a testing facility and requested to be transported there. See *People v Craun*, 429 Mich 859; 413 NW2d 421 (1987).

Furthermore, contrary to defendant's claim, defendant was not denied a "reasonable opportunity" to arrange for the administration of an independent blood-alcohol test by his lack of access to a phone from which he could make non-collect calls. Defendant was given the opportunity to use a phone in his cell from which he could make unlimited collect calls. He successfully called his father, who apparently disconnected the call. Defendant was not prevented from contacting a doctor, hospital, or anyone else to assist with arranging a blood test. Therefore, we hold that the trial court's denial of defendant's motion to dismiss was not an abuse of discretion.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad